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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 519

BIRCH SECURITIES COMPANY, *Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition for the writ of certiorari seeks review of a judgment of the District Court of Appeal, Third Appellate District, of the State of California, entered July 12, 1948 (R. 111), affirming a judgment of the Superior Court of the State of California, in and for the County of Sacramento. (R. 30.) The opinion of the District Court of Appeal is reported in 86 Advance California Appellate Reports 732, 196 P. (2d) 143.

The Supreme Court of California denied a petition for hearing. (R. 33.)

The Superior Court found (R. 25) upon the evidence introduced at the trial, and its findings were affirmed on appeal, that the Birch Securities Co., a Nevada corporation, qualified to do business in the State of California in 1934, and that during the tax period here involved the Birch Securities Co. engaged in activities in the State of California other than the receipt and disbursement of dividends from stock or interest from bonds; that it actively engaged in transactions in the State of California for the purpose of financial or pecuniary gain or profit; and that during the tax period involved the Birch Securities Co. was doing business within the limits of the State of California. (R. 26.) The court further found that after the filing of returns by the Birch Securities Co., the Franchise Tax Commissioner of the State of California examined the returns, computed the correct amount of tax due and mailed notices of additional tax proposed to be assessed and that the Birch Securities Co. received the notices but did not file a protest against the proposed levy, that thereafter the franchise tax commissioner mailed notices and demands for payments but that no payment has been made and that the whole of the additional tax is due, owing and unpaid. (R. 27-28.)

Petitioner, Birch Securities Co., contends that a federal court judgment is *res judicata*. The federal court action referred to by petitioner, No. 1430 B, was brought in the District Court of the United

States, in and for the Southern District of California, Central Division. It was brought by A. Otis Birch who owned stock in the Birch Holding Company, a corporation, which in turn owned the stock of the petitioner, Birch Securities Co., and it named Charles J. McColgan, as Franchise Tax Commissioner of the State of California, and certain other State officers as defendants, as well as the Birch Securities Co. and certain other corporate and individual defendants. (R. 140.) In the federal court action the plaintiff Birch sought to enjoin the Birch Securities Co. from paying any part of the taxes sought to be recovered in the present action which was pending, to enjoin the defendant state and county officers from maintaining or attempting to maintain any suspension or forfeiture of the charter of the Birch Securities Co. and to enjoin the defendant state and county officers from assessing or collecting or attempting to assess or collect any tax from the Birch Securities Co., and to stay all further proceedings in this state court action other than the dismissal thereof. (R. 164-165.)

Of this requested relief the only relief granted in the federal court action, however, was an injunction against maintaining or attempting to maintain or enforce any suspension or forfeiture of the corporate powers, rights or privileges of the Birch Securities Co., from prosecuting or threatening to prosecute any officer, director or agent of said company for or on account of the exercise of said powers, rights or privileges and from in any manner preventing or attempting to prevent the company from commencing,

maintaining or defending any action in any court of the State of California. (R. 108-109.) In essence, therefore, the injunction was against enforcing any suspension of the company.

The federal court first granted a preliminary injunction but only, as we have mentioned, to the extent of enjoining the enforcement of any suspension of the company. This preliminary injunction was accompanied by a memorandum opinion in the course of which it was stated in effect (39 Fed. Supp. 358, 366) that an injunction against maintaining or attempting to maintain any suspension or forfeiture of the charter of the Birch Securities Co. would enable that company to defend this state court action without fear of incurring any penalties by so doing. The federal court expressly refused to enjoin or in any way interfere with this state court action.

Thereafter a stipulation was entered into in the federal court action between the plaintiff Birch and certain of the defendants in that action. (R. 139.) The stipulation stated that the federal court had issued a temporary injunction against the defendant state and county officers restraining them from maintaining, enforcing or giving effect to the suspension of the corporation, and had denied all other relief. The stipulation went on to provide that findings of fact and conclusions of law might be made based upon the allegations of the plaintiff's complaint in that suit and final judgment entered thereon in the plaintiff's favor and against the said defendants, the same as if said defendants had defaulted at the trial of the action

upon the merits and the same as if the plaintiff had introduced evidence in support of each allegation, provided, however, that the relief granted the plaintiff in such action should be in conformity with the opinion of the court theretofore filed therein. (R. 140.)

Subsequent to the execution of the stipulation, judgment (R. 107) was entered in the federal court action against the defendant state officers, and a permanent injunction was issued of the same limited scope as the interlocutory, enjoining the enforcement of any suspension of the Birch Securities Co. As in the interlocutory injunction, so also in the permanent injunction, the court refrained from in any manner interfering with this state court action.

The petitioner, Birch Securities Co., now contends that the judgment in the federal court action not merely enables it to defend this state court action but is *res judicata*.

ARGUMENT.

I. PRINCIPLES SETTLED BY PRIOR DECISIONS OF THIS COURT CLEARLY ESTABLISH THAT THE FEDERAL COURT JUDGMENT RELIED UPON BY PETITIONER IS NOT A BAR TO THIS ACTION.

A. The plaintiff in this state court action was not a party to the federal court action.

A complete answer to petitioner's contention regarding *res judicata* is found in the circumstance that whereas the State is the plaintiff in the present action and is suing in the exercise of its sovereign power

to collect taxes,* it was not and could not be made a party to the federal court action. Hence the parties to the federal court case were not the same as the parties to this suit.

The State could not be made a party to the federal court case and could not be bound by any of the proceedings therein because a state cannot without its consent be sued by a private party in a federal court. In other words, a private party cannot make a state a party defendant without its consent in a federal court action. Federal courts do not have jurisdiction to entertain such suits. *Duhne v. New Jersey,* 251 U. S. 311, 313, 314.

In *Duhne v. New Jersey* this court observes at page 313 that "it has been long since settled that the whole sum of judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent * * *" (Citing cases.) And at page 314 this court refers to "the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent * * *"

Not only has the State not consented to be sued in an injunction proceeding in a federal court, but on the contrary the Legislature very clearly has expressed itself to the effect that the State does not consent to such a suit. Disapproval of injunction pro-

*Cf. *People v. Bruce*, C.C.A. 9, 129 F2d 421, 423, cert. den. 317 U.S. 678.

ceedings is expressed in Section 30 of the Bank and Corporation Franchise Tax Act.*

The plaintiff in the federal court action, therefore, was unable to bring the action against the State because the Legislature not only had not consented that the State be sued, but had affirmatively declared that the State does not consent to such a suit. In other words, the State expressly refused to be a party in such a suit. Accordingly, the plaintiff in the federal court brought the action against certain state officers. Such a suit could be maintained only on the basis that it was a personal suit against the defendants therein as individuals and was not a suit against the State (cf. *Ex parte La Prade,* 289 U. S. 444) and it follows that the State would not be bound by the judgment. *Carr v. United States,* 98 U. S. 433.

The State is entitled to its day in court and it cannot be compelled to litigate its rights in a federal court. The petitioner now is attempting to set up as *res judicata* against the State a judgment rendered in an action to which the State was not a party, a judgment which the federal court would have had no jurisdiction to render against the State if an attempt had been made to make the State a party.

A state cannot be forced by a private party into litigating its rights in a federal court, and it cannot be precluded by proceedings to which it was not a party.

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*Calif. Stat. 1939, ch. 1050, p. 2968, sec. 30; 3 Deering's Gen. Laws, Act 8488, sec. 30, quoted in the appendix to this brief. A similar provision is contained in art. XIII, sec. 15, of the Constitution of California and is quoted in the appendix to this brief.

The State was not a party to the federal court action and there is no basis of privity which would bind the State. The defendants in the federal court action were not authorized to represent the State in that action (as we have seen the State has not consented to such an action but on the contrary has expressly declared a policy against such an action), and the State is not claiming rights derived from anyone who was a party to that action, but rather is suing in the exercise of its sovereign power to collect taxes. Cases such as *Carr v. United States,* 98 U.S. 433, and *Stone v. Interstate Natural Gas Co.,* 103 Fed. (2d) 544, affirmed 308 U. S. 522, which we shall discuss later in the brief, clearly demonstrate that the State was neither a party nor in privity with anyone who was a party to the federal court action.

The statement is made at page 12 of the petition that the decision of this Court in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402, 403, relates to a state of facts almost identical to those in the within action. On the contrary, there is a clear point of distinction between the two cases. This Court said, at page 403 of the opinion in the *Adkins* case, that:

> "* * * The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy * * *"

The vital point of distinction is that in the *Adkins* case the representative of the United States had authority to represent its interests in the earlier litiga-

tion whereas here the defendants in the federal injunction proceedings did not have authority to represent the interests of the State of California in those proceedings. As we have seen, the State not only did not authorize representation, it expressly refused to be a participant in such proceedings.

Petitioner's citation of cases, such as the *Adkins* case, for the proposition that the State may be bound by a judgment in an action to which an officer of the State is a party in his official capacity, with respect to those matters as to which such officer has authority to represent the State in the litigation, has no significance here. As we have seen, the defendants in the federal court action were not authorized to represent the State in that action. A private party cannot make a state a party defendant without its consent in a federal court action. The State had not consented to such suit but had declared a policy against such suits. Since the defendants in the federal court action were not authorized to represent the State in that action, it matters not whether the judgment in that case was reached by default, stipulation or after contest, the State is not bound. The acts of the defendants in that suit do not constitute acts of the State since the defendants were not authorized to act for or represent the State in that suit. The State was not a party to the suit nor was there any privity between the State and the defendants in that suit.

Cromwell v. County of Sac, 94 U.S. 351, 353, cited by petitioner, held that the judgment in a prior action

was not *res judicata*. Moreover, what was said in that case concerning the effect of a prior judgment between the same parties or those in privity with them is inapplicable here because the State of California was not a party or in privity with anyone who was a party to the federal court action.

The principle that a state may not without its consent be sued by a private party in a federal court would be nullified if suit could be brought against state officers in a manner to which the state did not consent, and if the judgment rendered in such action were treated as binding upon the state. It would mean that a state would be concluded as to its rights by an action in a federal court to which it had not consented. Such is not the law. As we have seen, a state cannot be forced by a private person into litigating a matter in a federal court. A private person cannot against the state's consent prosecute a federal court action to a judgment which will be binding upon the state.

For the reasons we have stated, a judgment rendered against state or federal officers in an action to which the state or United States does not consent is not *res judicata* in a suit brought by the state or United States. Thus, for example, it has been held that a judgment rendered against officers of the United States in an action in which the United States did not consent to be sued, was not *res judicata* in a subsequent suit brought by the United States regarding the same matter. *Carr v. United States*, 98 U. S. 433.

The case of *Stone v. Interstate Natural Gas Co.*, C.C.A. 5, 103 Fed. (2d) 544, affirmed *per curiam* in 308 U. S. 522, shows that the federal court judgment relied upon by defendant is not *res judicata* because the state could not be made a party to the federal court action without its consent and was not a party thereto. In the *Interstate Natural Gas Co.* case the contention was made by a taxpayer that a decree of a three-judge federal court enjoining certain tax officers of the State of Mississippi from collecting under a tax statute of that state was *res judicata* in a subsequent action brought by the taxpayer, Interstate Natural Gas Co., against A. H. Stone, Commissioner of Franchise Tax, to recover taxes collected by him from the company under a similar statute. Although the three-judge case was decided under a different statute from the one involved in the subsequent suit, and although Stone was not one of the tax officials named as a party in the three-judge suit, nevertheless one of the alternative grounds of decision stated by the Circuit Court of Appeals was founded upon the reasoning that although an injunction was issued against state officials in the three-judge suit, the State of Mississippi was not a party to the three-judge case and was not bound by the judgment in that case. The Circuit Court of Appeals stated at page 547:

> "We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it.

> This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is descriptio personae. *Smietanka, Collector, v. Indiana Steel Co.,* 257 U. S. 1, 42 S. Ct. 1, 66 L. Ed. 99. The three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. *The state of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued.* She could not under the Eleventh Amendment, U. S. C. A. Const. have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their government not be bound by the judgments, is fully explained in *United States v. Lee,* 106 U. S. 196, 222, 1 S. Ct. 240, 27 L. Ed. 171. See also *Sage v. United States,* 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828. *Hassey v. Crane,* 222 U. S. 88, 93, 32 S. Ct. 33, 56 L. Ed. 106. *Carr v. United States,* 98 U. S. 433, 25 L. Ed. 209. *Stanley v. Schwalby,* 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960. *Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; and as she is not bound by the former, judgment against her officers, he is not.*" (Emphasis added.)

We think it is evident from the authorities we have cited that the State was not a party to the federal court action and that the judgment therein is not *res judicata* in the present action.

The only cases cited by petitioner on the *res judicata* point, *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 402, 403, and *Cromwell v. County of Sac,* 94 U.S. 351, 353, are inapplicable here for reasons already stated in this brief. On the other hand, petitioner makes no effort to meet or discuss the authorities relied upon by the District Court of Appeal in reaching its decision and does not so much as refer to those authorities except for a casual remark, such as appears at page 14 of the petition, to the effect that "It would seem that the case of *Stone v. Interstate Natural Gas Company,* 103 F. (2d) 544, cited in the opinion of the District Court of Appeal, as well as each of the other cases therein cited, have no relationship to the facts of, or to the principles of law involved in, the present action".

The failure of petitioner to come forward with any adequate answer to the well settled principles announced in the decisions relied upon by the District Court of Appeal demonstrates that no substantial question is presented and that the petition should be denied.

B. The judgment in the federal court action would not be conclusive of the present action even if the State had been a party to the federal court action.

Absence of the State from the federal court action provides, we believe, a complete answer to petitioner's contention of *res judicata.*

We feel it is pertinent to observe, however, that petitioner is seeking to give the action of the federal

court an effect beyond that which would be warranted even if the State had been a party to the federal court action which, of course, it was not. While the plaintiff Birch in the federal court sought to enjoin this state court action to collect the tax, the federal court expressly refused to do so but enjoined the defendant state officers from enforcing any suspension against the Birch Securities Co. in order that it might defend in this action.

As we previously have mentioned, the federal court first granted a preliminary injunction, but only to the extent of enjoining the enforcement of any suspension of the company. This preliminary injunction was accompanied by a memorandum opinion in the course of which it was stated in effect (at page 366 of 39 Fed. Supp.) that an injunction against maintaining or attempting to maintain any suspension or forfeiture of the charter of the Birch Securities Co. would enable that company to defend this state court action without fear of incurring any penalties by so doing. The parties in the federal court action stipulated that the relief granted in the final judgment should be in conformity with the opinion of the court.

Although it was the purpose of the federal court judgment to permit the Birch Securities Co. to defend in this state court action, the contention now is made that because of that judgment there is nothing left to litigate in the state court action. We respectfully submit that there would be no merit in petitioner's claim of *res judicata* even if the State had been a

party to the federal court action. However, as we have pointed out, the State was not a party to the federal court action and the judgment in that action cannot in any event be *res judicata* here.

CONCLUSION.

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
March 9, 1949.

Respectfully submitted,

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(Appendix Follows.)

Appendix

Constitution of California, Article XX, Section 6:

"Suits may be brought against the State in such manner and in such courts as shall be directed by law."

Constitution of California, Article XIII, Section 15:

"* * * No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

Bank and Corporation Franchise Tax Act, Section 30:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the assessment or collection of any tax under this act but any taxpayer claiming that the tax computed and levied against it pursuant to section 25 of this act is void in whole or in part may bring an action against the commissioner for the recovery of the whole or any part of the amount paid.

* * * * * * *

Within ninety days after the mailing of the notice of the commissioner's action upon any refund claim, or in case of an appeal to the State Board of Equalization from the disallowance of any refund claim, within ninety days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment.

* * * * * * *

Whenever under the provisions of this section an action is commenced against the commissioner, a copy of the complaint and the summons must be served upon the commissioner or assistant commissioner. At the time the commissioner demurs or answers, he may demand that the action be tried in the superior court of the county of Sacramento, which demand must be granted. The Attorney General or the counsel for the commissioner must defend the action. The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. * * *"

(California Statutes 1939, Ch. 1050, p. 2968, sec. 30; 3 Deering's Gen. Laws, Act 8488, sec. 30.)